IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

MISC. PETITION NO. 3 OF 2002

Sicom Limited .. Petitioner

versus

Kamal Kumar Saraf & ors. .. Respondents.

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Mr.S.Shah with Mr.P. Gunwani and Mr. K. Chotani i/b R.C. Dalal for respondent Nos.1 and 2.

Mr. S.K. Jain with A.R. Bamne for respondent Nos. 3c to 3e.

CORAM : S.U. KAMDAR. J.

DATED : 8th June 2005.

P.C.:

1. The present petition is filed u/s 31(i) (aa) of the State Financial Corporation Act 1951.

2. Some of the material facts of the present case

are briefly enumerated as under;

The Company known as Shree Mahavir Ispat Limited was constituted and incorporated under the provisions of Companies Act 1956. The said Company from time to time sought various loans from the petitioner. Some time in the year 1973 the petitioner sanctioned term loan of Rs. 20 lakhs. In September 1983 further application was made and pursuant thereto additional loan of Rs.38.25 lacs was sanctioned. Thereafter on 26th April 1985 once again application was made for further sanction of loan of Rs. 48 lacs. On 30/11/1987 fresh application for additional loan of Rs.37.50 lacs was made by Company for modernization of existing facilities. On 8.9.90 further loan of Rs.9.42 lacs was sought for Modernization Scheme for Tarapur Unit. On 26.2.1985 additional loan of Rs.82.50 lakhs was granted for setting up manufacturing unit of mild steel and stainless steel ignots at Yawat. On 25/3/87 further additional loan of Rs.7.50 lacs was sanctioned and once again on 8.1.1993 additional loan of Rs.16.25 lacs was obtained under the BIFR package.

3. Repayment of the aforesaid loans granted from

time to time was guaranteed to the petitioners by the respondents by executing Guarantee Deeds dated 5.5.1987 and 22.8.1987. The Principal Borrower also executed indenture of mortgage, mortgaging properties belonging to the Principal Borrower with the petitioner financial institution. Thus, in all the petitioner have disbursed huge amount of loan of approximately 3,42,25,100/- The said amount of loan was repayable with interest and on default the petitioner are also entitled to levy additional interest as a penal interest thereon.

4. Under the terms and conditions of Guarantee the respondents were liable to make repayment of aforesaid amount of loan lent and advance by the petitioner to the Principal Borrower alongwith the interest in the event if the Principal Borrower commits default in repayment thereof.

5. It is the case of the petitioner that the Principal Borrower i.e. Shree Mahavir Ispat Limited committed default in making repayment of the aforesaid amount of loan lent and advance to the Company. Thus, the petitioner recalled the said loan amount by issuing notice to the Principal Borrower.

It is further the case of the petitioner that inspite of various notices addressed to the Principal Borrower, the Principal Borrower did not make the re-payment and ultimately the said company was declared as sick industry and reference was registered with the Board of Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies Act (Special Provision) Act 1985. BIFR by order dated 4.9.2000 recommended winding up of the said Company. An appeal was preferred to the Appellate Authority being Appeal No. 404/2000. However, the said Appeal also was dismissed by order dated 6.2.2001. Pursuant to the recommendation of the said BIFR which have became final an official liquidator High Court Bombay has been appointed as liquidator of the said Company in winding up.

6. In the aforesaid circumstances the Petitioner by their demand notice dated 29.11.2000 called upon the respondents to make the re-payment of aggregated amount of Rs.9,83,72691/- which was then outstanding with interest as on 31/10/2000. Inspite of the aforesaid notice, the respondent guarantors did not respond and repaid the said amount and thus, the present petition is filed by the petitioner u/s 31(i)

(aa) r/w 32 of the State Financial Corporation Act for declaration that the respondents are liable to make payment of Rs.7,91,03,682/- as per the particulars of claim set out in the said petition. The respondents have filed their affidavit in reply and have raised various defences , some of which can be briefly enumerated as under;

(i) that the present petition is not maintainable in view of the fact that there is no demand notice on the Principal Borrower demanding repayment of dues as required u/s 126 of the Contract Act

(ii) that the mortgaged property has been sold by the petitioner at a very meagre price and thus security of respondents have been deprivated unlawfullly. Therefore, to that extent the respondents are discharged from making repayment of loan amount to the petitioner.

(iii)that the principal borrower has already filed a suit for damages as against the company and the said suit for damages is pending. The said suit is being filed on the ground that the petitioner has committed breach of terms and conditions of loan

agreement and that the properties of the principal debtors are sold at much lower price thus the valuation report prepared by the bank.

(iv) Claim against respondent is not crystalised because the claim for damages is still pending and till and until the said claim is finally determined , the present petition is not maintainable.

(v) It has been contended that petitioners are not entitled to file additional affidavit and bring demand notices on record which has been issued to the Principal Borrower because the same is not produced in the petition and that the respondents are entitled to cross examination the petitioner about non production of demand notice and till it is so done the present petition ought not to be granted.

7. Petitioners also have filed an affidavit in terms of Judgement of Apex Court in case of Central Bank of India Versus Ravindran reported in 2002(1) SCC 367 and has set out revised claim in terms thereof. According to the petitioner, the respondents are liable to make the payment of Rs.5,79,64,991/-

including interest amount. The respondents have reduced interest claim in view of the aforesaid judgement of the apex court and reduced the compound interest charged on the penal interest the extent of Rs.2,31,86,000/- and has re worked out the said figures.

8. Pursuant to my directions the petitioners have also filed an additional affidavit dated 19/4/2005 annexing therewith the demand notice issued by the petitioner to the borrower company Shree Mahavir Ispat Limited recalling the amount as well as calling upon them to make the payment of the amount outstanding amounting to Rs.7,73,78,777/- with further interest thereon.

9. I have considered the aforesaid contentions by the learned counsel for respondents. First contention that there is no demand notice by the petitioner against the Principal Borrower and therefore, there is no liability to make the payment by the respondent to the petitioner is without any merits. Not only that the demand notice has been produced by the additional affidavit but even the record of petitioner was produced to show that the

said notice has been duly served upon on the Principal Borrower. Learned counsel for respondent though sought to contend that there is no proof of service of notice but I am satisfied from the record produced by the petitioner including inward register that the notice is duly served on the Principal Borrower and therefore, first contention that there is no notice of demand and therefore, u/s 126 of Contract Act the petitioner is not entitled to invoke the guarantee , is without any substance and without any merits. I,therefore, reject the said contention. However, the learned counsel for respondent has contended that there is no proof of service of notice. I have seen outward register maintained by the Company in usual course of business. Xerox copy of the same is also produced before me. The said letters are sent under Certificate of Posting and proof of Certificate of Posting is also produced before me. Apart therefrom letter dated 12/10/2000 which has been produced before me was once again referred to in the letter dated 23rd November 2000 addressed by the petitioner to the said company. The said letter referred to the demand notice and in so far as the said letter is concerned, there is no dispute that the said letter has been duly received.

From the aforesaid position it is not possible for me to accept the contention that there is no service of demand notice on the Principal Borrower or that the document produced being Notice dated 12th October was not served on the company.

10. The next contention raised by the learned counsel for defendants nos. 1 and the legal heirs of defendant no.3 is that Suit No.4134/97 is pending. The said suit is prior in point of time. According to the respondent the said suit has been filed for the claim of damages. It has been contended that the Principal Debtor has filed the suit being inter alia claiming from the petitioner damages for sum of Rs.5,181.79 lacs with interest with 18% per annum from the date of filing of suit till payment. It has been contended that the petitioners have not filed any written statement and therefore, there is no defence by the petitioner in the said proceedings . It has been further contended that in view thereof the said claim of the Principal Borrower should be deemed to have been accepted and thus in the light aforesaid position this Court ought not pass any orders in the present Petition. Alternatively it has been argued that in any event till and until the said

suit is decided, the amount payable by respondents to the petitioners is not crystalised sum and thus, also respondents are not liable to make payment to the petitioners herein.

11. The essence of the said suit seems to be that the assets of the borrower company has been sold by the Principal Debtor at much lower amount than the valuation of assets considered in a meeting of BIFR dated 20th April 1997. According to the respondents the said valuation was done by an approved valuer appointed by the Bank of Baroda whereas the assets are sold by the petitioners at much lesser price being Rs. 67,41,013/-.

12. The second ground on which the said suit is filed against the petitioner is that they have committed breach of terms and conditions of the loan amount and therefore, the petitioner is liable to make good claim for damages to the principal debtor. I do not find any substance in either of the said contention. The suit for damages can not affect the proceedings u/s 31 (1)(aa) of the State Financial Corporation Act as held by various Judgements of the Apex Court starting from Gujrat State Financial

Corporation Versus Natsos Manufacturing Company Private Limited and others reported in AIR 1979 SC 1765;1979(1) SCC 193; Everest Industrial Corporation and Others Versus Gujrat State Financial Corporation AIR 1987 SC 1950; 1987(3) SCC 597; Maganlal Versus Jaiswal Industrial Heemach & Others AIR 1989 SC 2113; 1989(4) SC 344 and The Maharashtra State Finaicial Corporation Vs. Jaycee Drugs & Pharmaceuticals Private Limited and Others reported in JT 1991(1)SC 524. It is now well settled that the proceedings u/s 31(1)(aa) is in the nature of execution of decree and therefore, question of giving set off of any claim for damages as contended by respondents does not arise. Even if the petitioner has not filed written statement to the said suit preferred by the Principal Borrower claiming damages then it is open for the Principal Borrower to adopt any appropriate legal proceedings as may be available for him in law to obtain a decree and it is only if a decree is passed in favour of the plaintiff that question of taking the said claim into consideration may arise by this court. In any event admittedly the suit is for damages. It is by now settled law that claim for damages cannot be entertained or considered unless the same are proved by the persons claiming such

damages. In that view of the matter the argument that the claim for damages should be set off against the claim of the petitioner can not be accepted. In view of aforesaid view I do not find any merits in the contention that the present petition should be dismissed or the same should be postponed till the disposal of the said suit being Suit No. 4134/97 filed by the Principal Borrower. In my opinion each of the submissions raised by the learned counsel for respondents are devoid of any merits and in view thereof, I reject the same and pass following order.

:ORDER:

Respondents are directed to make the payment to the petitioner jointly and severally of sum of Rs.5,79,64,991/- with further interest at the rate of 12% per annum .

The petition is disposed off accordingly, however, no order as to costs.

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